Tan Teck Hing & Anor v Lee Yong Kong & Anor

HIGH COURT (MELAKA) — CIVIL APPEAL NO 12–1 OF 2002
LOW HOP BING J
10 JANUARY 2003

Damages (Personal Injury or Death) *— Personal injuries — Loss of future earnings — Whether the second plaintiff had discharged the burden of proof in establishing that the accident had resulted in his loss of future earnings — Whether the award of RM40,000 for loss of libido was fair and reasonable — Whether there was any evidence to support the award of the trial judge — Whether the second plaintiff was justified in adopting the itemization process in assessing damages*

The appellants appealed against the decision of the learned trial judge for the quantum of damages awarded to the second plaintiff in respect of loss of future earnings, loss of libido, loss of smell and reduced taste sensation and overlapping damages. The issues for the determination of the court were: (i) whether the second plaintiff had discharged the burden of proof in establishing that the accident had resulted in his loss of future earnings; (ii) whether the award of RM40,000 for loss of libido was fair and reasonable; (iii) whether there was any evidence to support the award of the trial judge; and (iv) whether the second plaintiff was justified in adopting the itemization process in assessing damages.

Held, allowing the appeal against the award for loss of future earning and setting aside the award thereon, and dismissing the appeal against the other awards:

(1) It was apparent that the learned trial judge's finding was against the weight of evidence. The balance of probabilities would have been in favor of the second plaintiff if there had been no contradictory evidence by the second plaintiff who had indeed removed all the probabilities in respect of his loss of future earnings. He had as a matter of fact succeeded in proving that he had been gainfully employed after the accident. Hence, the award by the learned trial judge could not be sustained. The alternative submission that the second plaintiff would sometime in the future be subject to the risk that he might lose his employment and be disadvantaged in getting alternative employment because of his injuries seemed to run counter to the second plaintiff's own evidence as alluded to above. Therefore, the court was unable to upheld this submission (see p 605A–D).

(2) The stand taken for the second plaintiff was that the specialists had come to a conclusion that the second plaintiff had suffered loss of libido. These two medical reports had been agreed to by the parties herein and accepted by the learned trial judge. In this respect, there had been no error of fact or law on the part of the learned trial judge. Further, it was also vital to state that at the hearing in the court below, the defendants' learned counsel had

not cross-examined the witnesses such as the second plaintiff or his wife on this fundamental fact. In an appeal against the quantum of damages, it is settled law that the onus on the appellant was an onerous one and it must be established plainly that the trial judge's award was a wholly erroneous estimate. Thus, the High Court agreed and adopted this principle and held that the award of RM40,000 for loss of libido was fair and reasonable and not a wholly erroneous estimated (see pp 605E–G, 606G–H); *Hang Jong Juan v Tan Yeo Soon* [1986] 2 MLJ 5 followed.

(3) The award for the disability, ie loss of smell and reduced taste sensation, was based on medical reports which had been agreed upon by the parties herein. Further, learned counsel for the defendants had chosen not to cross-examine the second plaintiff. It seemed clear that this was tantamount to an abandonment of the pleaded case and so the defendants might be properly barred from raising it in argument. In any event, the medical reports prepared for the second plaintiff did specifically refer to this disability. Thus, there was no error occasioned by the learned trial judge in this award (see p 607B–D); *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770, *Sivalingam Periasamy v Periasamay & Anor* [1996] 4 CLJ 545 and *Joremi bin Kimin & Anor v Tan Sai Hong* [2001] 1 MLJ 268 referred.

(4) There were merits in the submission for the second plaintiff and the award of the learned trial judge for the aforesaid injuries by way of itemization was not strictly prohibited. The courts in Malaysia are free to take their own course. The assessment of damages was essentially an exercise of discretion. The individual quantum awarded was fair and reasonable, for separate and distinct parts of the second plaintiff's anatomy in which case the element of overlapping did not arise (see pp 607G–608B); *Jamil bin Harun v Yang Kamsiah & Anor* [1984] 1 MLJ 217 and *Chong Chee Khong & Anor v Ng Yeow Hin*[1997] 5 MLJ 786 followed.

[Bahasa Malaysia summary

Perayu-perayu telah membuat rayuan terhadap keputusan hakim perbicaraan yang bijaksana tentang kuantum untuk ganti rugi yang telah diawardkan kepada plaintif kedua berhubung kehilangan mata pencarian masa hadapan, kehilangan libido, kehilangan deria hidu dan deria rasa yang berkurangan dan ganti rugi-ganti rugi yang bertindan. Persoalan-persoalan untuk ditentukan oleh mahkamah adalah: (i) sama ada plaintif kedua telah dapat membuktikan bahawa kemalangan tersebut telah mengakibatkan beliau kehilangan mata pencarian masa hadapan; (ii) sama ada award RM40,000 untuk kehilangan libido adalah adil dan munasabah; (iii) sama ada terdapat apa-apa keterangan untuk menyokong award hakim perbicaraan; dan (iv) sama ada plaintif kedua mempunyai justifikasi dalam menerapkan proses pembutiran untuk menilai ganti rugi.

A **Diputuskan**, membenarkan rayuan terhadap award untuk kehilangan mata pencarian masa hadapan dan mengenepikan award tersebut, dan menolak rayuan terhadap award-award yang lain:

(1) Adalah jelas bahawa penemuan hakim perbicaraan yang bijaksana adalah bertentangan dengan kepentingan keterangan. Imbangan
B kebarangkalian akan menyebelahi plaintif kedua jika tiada keterangan yang bercanggah oleh plaintif kedua yang menolak kesemua kebarangkalian berhubung kehilangan mata pencarian masa hadapan beliau. Beliau pada hakikatnya telah berjaya membuktikan bahawa beliau beroleh pekerjaan selepas
C kemalangan tersebut. Justeru itu, award oleh hakim perbicaraan yang bijaksana tidak boleh dikekalkan. Hujah yang alternatif bahawa plaintif kedua akan pada masa hadapan mengalami risiko kehilangan pekerjaan dan tidak akan dapat pekerjaan lain kerana kecederaan beliau kelihatan bertentangan dengan keterangan plaintif kedua sendiri sebagaimana yang telah dinyatakan di atas.
D Oleh itu, mahkamah tidak boleh mengekalkan hujah ini (lihat ms 605A–D).

(2) Pendirian yang diambil oleh plaintif kedua adalah bahawa pakar-pakar tersebut telah tiba kepada satu kesimpulan bahawa plaintif kedua telah mengalami kehilangan libido. Kedua-dua laporan
E perubatan tersebut telah dipersetujui oleh pihak-pihak berikut dan juga diterima oleh hakim perbicaraan yang bijaksana. Sehubungan itu, tidak terdapat apa-apa kesilapan dari segi fakta atau undang-undang di pihak hakim perbicaraan yang bijaksana tersebut. Tambahan pula, ia juga adalah penting untuk dinyatakan bahawa semasa perbicaraan di mahkamah bawahan,
F peguam defendan yang bijaksana tidak memeriksa balas saksi-saksi seperti plaintif kedua atau isteri beliau berhubung fakta penting ini. Dalam suatu rayuan terhadap kuantum ganti rugi, ia adalah undang-undang tetap bahawa beban yang terletak ke atas perayu adalah berat dan ia harus dibuktikan dengan nyata bahawa award hakim perbicaraan telah sama sekali dinilai dengan salah.
G Oleh itu, Mahkamah Tinggi bersetuju dan menerima prinsip ini dan memutuskan bahawa award RM40,000 untuk kehilangan libido adalah adil dan munasabah dan sama sekali tidak dinilai dengan silap (lihat ms 605E–G, 606G–H); *Hang Jong Juan v Tan Yeo Soon* [1986] 2 MLJ 5 diikut.

H (3) Award untuk ketidakupayaan, iaitu kehilangan deria hidu dan deria rasa yang berkurangan, adalah berdasarkan laporan-laporan perubatan yang telah dipersetujui oleh pihak-pihak terlibat. Tambahan pula, peguam defendan yang bijaksana telah memilih untuk tidak memeriksa balas plaintif kedua. Adalah jelas bahawa ini sama seperti satu tindakan menghentikan kes yang diplikan
I dan oleh itu defendan-defendan boleh dihalang daripada menimbulkannya dalam hujah. Dalam apa keadaan pun, laporan-laporan perubatan tersebut yang disediakan untuk plaintif kedua

memang secara khusus merujuk kepada ketidaupayaan ini. Oleh itu, tidak terdapat sebarang kesilapan yang dilakukan oleh hakim perbicaraan yang bijaksana dalam award ini (lihat ms 607B–D); *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770, *Sivalingam Periasamy v Periasamay & Anor* [1996] 4 CLJ 545 dan *Joremi bin Kimin & Anor v Tan Sai Hong* [2001] 1 MLJ 268 dirujuk.

(4) Terdapat merit dalam hujah bagi pihak plaintif kedua dan award hakim perbicaraan yang bijaksana untuk kecederaan-kecederaan tersebut melalui pembutiran tidak dihalang. Mahkamah-mahkamah di Malaysia bebas untuk membuat keputusan sendiri. Penilaian ganti rugi adalah penting dalam melaksanakan budi bicara. Setiap kuantum yang diawardkan adalah adil dan munasabah, untuk bahagian anatomi plaintif kedua yang berasingan dan berbeza di mana elemen pertindihan tidak timbul di sini (lihat ms 607G–608B); *Jamil bin Harun v Yang Kamsiah & Anor* [1984] 1 MLJ 217 dan *Chong Chee Khong & Anor v Ng Yeow Hin*[1997] 5 MLJ 786 diikut.]

Notes

For cases on loss of future earnings, see 6 Mallal's Digest (4th Ed, 1997 Reissue) paras 596–608.

Cases referred to

Abu Hassan bin Ali v Lee Peng Kong [1977] 2 MLJ 121 (refd)
Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770 (refd)
Ariffin bin Omar v Goh Beng Kee & Anor No 1603 of 1988 (refd)
Browne v Dunn (1893) 6 R67 (refd)
Chong Chee Khong & Anor v Ng Yeow Hin [1997] 5 MLJ 786 (folld)
Chua Kim Liang & Anor v Teo Kim Ngo [1963] MLJ 262 (refd)
Hang Jong Juan v Tan Yeo Soon [1986] 2 MLJ 5 (folld)
Jamil bin Harun v Yang Kamsiah & Anor [1984] 1 MLJ 217 (folld)
Joremi bin Kimin & Anor v Tan Sai Hong [2001] 1 CLJ 526 (refd)
Loh Soon Thiam v Othman bin Wahab [1979] 1 MLJ 43 (refd)
Malayan Railway Administration v Wong Ah Lek & Ors [1970] 1 MLJ 215 (refd)
Sivalingam Periasamy v Periasamy & Anor [1996] 4 CLJ 545 (refd)
Yee Yat Wah v Hoo Wong @ Hoh See Wong dan satu lagi dan pihak ketiga [1994] MLJU 139 (refd)

Legislation referred to

Evidence Act 1950 s 101

Appeal from: Civil Suit No (2)–53–247 of 1999 (Sessions Court, Melaka)

TS Wee (*David Lingam & Co*) for the appellants/defendants.
CS Ng (*Murphy & Dunbar*) for the second respondent/plaintiff.

Low Hop Bing J: This is an appeal by the appellants (the defendants in the sessions court) in which the notice of appeal was drafted as an appeal against the entire decision of the learned trial judge who had on 3 January 2002 found the defendants 100% liable in a motor vehicle accident, thereby awarding damages as follows:

(1) to the first respondent (first plaintiff in the sessions court), general damages of RM13,000, special damages of RM4,155, with interest;

(2) the second respondent (second plaintiff in the sessions court), general damages of RM130,000, special damages of RM167,154.69, together with interest; and

(3) costs of RM15,692.40.

However, the defendants have on 4 July 2002 withdrawn their appeal against liability and also the quantum of damages awarded by the trial court in favor of the first plaintiff.

The appeal before me is accordingly confined to the quantum of damages awarded to the second plaintiff in respect of:

(1) loss of future earnings;

(2) loss of libido;

(3) loss of smell and reduced taste sensation; and

(4) overlapping in the context of personal injury claim.

Loss of future earnings

For the second plaintiff's claim for loss of future earnings, the learned trial judge awarded a sum of RM600 for 14½ years, amounting to RM104,400, on the ground that the second plaintiff aged 30 at the time of the accident has adduced evidence by way of a medical report prepared by consultant neurosurgeon, Dr Chee Chin Pin, to the effect that the second plaintiff had not been working since the accident until two months before the date of the medical report dated 9 December 2000, ie October 2000 when he attempted to go back to work but 'was stopped by his boss a month later because of slowness in his work'. As a result, the second plaintiff was 'helping in household chores, like sweeping the floor and cooking. Otherwise, he would watch television or eat tidbits'.

The second plaintiff is a sub-contractor of SP5, one Siew Kam Vin of Mavin Engineering and Trading Sdn Bhd ('Mavin') dealing in air-conditioning works. SP5 confirmed the second plaintiff's slowness in his work.

There was evidence adduced from the defendant's own witness SD2, one Jayabal David, an adjuster who testified to the effect that for two days during which he kept surveillance on the second plaintiff, he found that the second plaintiff was not working.

On the aforesaid award by the learned trial judge, it was submitted by learned counsel, Mr TS Wee, for the defendants, that there was excessive and unsubstantiated award for loss of future earnings, as the second plaintiff has testified that he has been working since August 2000 and that from December 2000, he was working for one Ah Seng only, who has no connection with Mavin, for an average of 21 to 22 days monthly, earning RM80 daily. This was confirmed by the second plaintiff under cross-examination by learned counsel for the defendants, as a result of which he submitted that there should be no award for loss of future earnings.

For the second plaintiff, it was contended by learned counsel, Mr CS Ng that in making an award for loss of future earnings, the totality of evidence must be taken into account, as the second plaintiff had suffered a severe head injury and therefore care should be taken in evaluating his evidence. He added that medical evidence confirmed that the second plaintiff did not have insight of his behavior problem, had no interest in work ambition or motivation and thus unable to continue with his work. It was further argued that the second plaintiff's employer had confirmed that after the accident the second plaintiff was unable to perform his work satisfactorily and as such his earnings were less. He relied on the adjuster's evidence that the second plaintiff was not working for two days.

In my judgment, the burden of proof is on the second plaintiff to establish that the accident had resulted in his loss of future earnings which he has asked the court to make an award in his favor. This is clearly borne out in s 101 of the Evidence Act 1950 which reads as follows:

> Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of the facts which he asserts, must prove that those facts exist.

After considering the totality of evidence adduced by and for the second plaintiff, the question is whether he has discharged this burden of proof. The finding of the learned trial judge was essentially and indeed exclusively based on the medical report, SP5 Siew Kam Vin of Mavin and the adjuster's evidence that the second plaintiff was away from work for two days. Had there been no other evidence to the contrary or indeed contradicting the aforesaid evidence, the learned trial judge would have been correct in his award. Unfortunately, the learned trial judge has made absolutely no evaluation on or reference whatsoever to the second plaintiff's own crucial evidence pertaining to his ability to work for one Ah Seng who the second plaintiff confirmed has nothing to do with Mavin and that he was earning RM80 daily for 21 to 22 days per month after the accident. Had the learned trial judge evaluated or referred to the second plaintiff's said evidence, his finding and the award made thereon may well have been different. The learned trial judge did not say whether he believed or disbelieved the second plaintiff's entire evidence, nor rejected it and the reason for the rejection if that be the case. It is to be observed that the second plaintiff's evidence remains unshaken in the re-examination by his learned counsel. The second plaintiff's evidence has rebutted the evidence in the medical report and the evidence that he was working in Mavin.

A The entire evidence of the adjuster established that the second plaintiff was not working for the two days under surveillance and that was completely consistent with the second plaintiff's own evidence that he was merely working for 21 to 22 days per month. In the circumstances, it is apparent to me that the learned trial judge's finding is against the weight of evidence. The balance of probabilities would have been in favor of the B second plaintiff if there had been no contradictory evidence by the second plaintiff who has indeed removed all the probabilities in respect of his loss of future earnings. He has as a matter of fact succeeded in proving that he has been gainfully employed after the accident. Hence, this award by the learned trial judge cannot be sustained (see *Malayan Railway Administration v Wong Ah Lek & Ors* [1970] 1 MLJ 215 (HC)).

C The alternative submission for the second plaintiff that the second plaintiff would sometime in the future be subject to the risk that he might lose his employment and be disadvantaged in getting alternative employment because of his injuries seems to me to run counter to the second plaintiff's own evidence as alluded to above. I am therefore unable D to uphold this submission.

Loss of libido

It was submitted for the defendant that the learned trial judge has made an award of RM40,000 in favor of the second plaintiff for loss of libido, in the E absence of any medical test to establish this.

The stand taken for the second plaintiff is that the specialists had come to a conclusion that the second plaintiff has suffered loss of libido.

In my judgment, a proper perusal of the appeal record reveals that Dr M Nachiappan a neurosurgeon has stated in his medical report that the F second plaintiff's wife has complained that he has lost his libido since the accident, while Dr Chee Chin Pin, another neurosurgeon, opined in his medical report that the second plaintiff has decreased libido, having sex once or twice a month. It is to be observed that these two medical reports have been agreed to by the parties herein and so have been accepted by the learned trial judge. In this respect, I am of the view that there has been no G error of fact or law on the part of the learned trial judge.

It is also vital to state that at the hearing in the court below, the defendants' learned counsel has not cross-examined the witnesses such as the second plaintiff or his wife on this fundamental fact.

Hence, I am unable to see how the defendants' learned counsel can now H raise it as an issue in this appeal.

In *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 at p 794, the Court of Appeal when applying the rule in *Browne v Dunn* (1893) 6 R67 (HL) said (at p 794):

I > It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it

> in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.

(See also *Sivalingam Periasamy v Periasamy & Anor* [1996] 4 CLJ 545 at p 551 (CA) and *Joremi bin Kimin & Anor v Tan Sai Hong* [2001] 1 CLJ 526 at p 533 (CA); [2001] 1 MLJ 268).

Respective learned counsel appeared to be at variance as to the exact meaning of 'loss of libido', ie whether it is impotency or lack of sexual desire. In my view, libido means sexual desire (see *Oxford Advanced Learner's Dictionary* (6th Ed)). Loss of libido is a loss of sexual desire which may be distinguished from complete impotency which implies the inability to gain an erection or the lack of sexual desire (see *Traumatic Medicine and Surgery for the Attorney*, Vol 5 1961 at p 519 — 'DEFINITION'). In any event, I am of the view that the difference is not a matter of kind but merely a matter of degree in that impotency involves a more serious degree of sexual impairment while loss of libido brings about a situation of relatively minor concern.

I shall now proceed to make a survey, which I must add is not exhaustive, on the quantum for this kind of cases.

In *Ariffin bin Omar v Goh Beng Kee & Anor* No 1603 of 1988, the assistant registrar of the Singapore High Court awarded a sum of S$55,000 for the rupture of urethra and impotency arising out of an accident on 14 March 1987.

In *Yee Yat Wah v Hoo Wong @ Hoh See Wong dan satu lagi dan pihak ketiga* [1994] MLJU 139, Wan Mohamed J (as he then was) awarded RM60,000 for impotency.

Further, in *Abu Hassan bin Ali v Lee Peng Kong* [1977] 2 MLJ 121, on a finding of loss of sexual function, in addition to multiple abrasions and lacerations, Abdul Hamid J (later LP) awarded a sum of RM27,500, while Ismail Khan J's (later CJ (Borneo)) award of RM25,000 for pain and suffering including loss of sexual function was upheld by the Federal Court in *Chua Kim Liang & Anor v Teo Kim Ngo* [1963] MLJ 262.

In *Loh Soon Thiam v Othman bin Wahab* [1979] 1 MLJ 43, an award of RM32,000 was handed down by Gunn Chit Tuan J (as he then was) for impairment of sexual performance including injuries to radius, ulna and femur.

In *Hang Jong Juan v Tan Yeo Soon* [1986] 2 MLJ 5, the Singapore Court of Appeal held that in an appeal against the quantum of damages it is settled law that the onus on the appellant is an onerous one and it must be established plainly that the trial judge's award was a wholly erroneous estimate. I agree and adopt this principle here and hold that the award of RM40,000 for loss of libido is fair and reasonable and not a wholly erroneous estimate.

Loss of smell and reduced taste sensation

The learned trial judge awarded a sum of RM20,000 for this item which in this appeal the defendant submitted was unsubstantiated and unjustified in

A that no tests were carried out by the doctors preparing their medical reports and that there were discrepancies. It was further contended that the second plaintiff was found by the adjuster to be cooking at home, which a person cannot do if he had suffered loss of smell and reduced taste sensation.

For the second plaintiff, it was stressed that the learned trial judge had
B not erred in making this award as the medical reports contained clear and precise findings on this item.

The issue before me is whether there is any evidence to support the trial judge's award. As in the award for loss of libido, the award for this disability is based on medical reports which have been agreed upon by the parties herein. Further, in respect of this disability, learned counsel for the
C defendants had chosen not to cross-examine the second plaintiff, in which case it seems clear to me that this is tantamount to an abandonment of the pleaded case and so the defendants may be properly barred from raising it in argument (see *Aik Ming (M) Sdn Bhd, Sivalingam Periasamy* and *Joremi bin Kimin*).

D In any event, the medical reports prepared for the second plaintiff did specifically refer to this disability, eg reports by Dr Loh Thim, Dr Chee Wee Liam and Dr M Nachiappan. There is in my view no error occasioned by the learned trial judge in this award.

Overlapping of damages

E

It was submitted that there was overlapping in the award by the trial judge in respect of the following injuries:

(1) head injury RM70,000;

(2) loss of libido RM40,000; and

F (3) loss of smell and taste RM20,000.

The defendants argued that these injuries emanated from the same source, ie the head but that the learned trial judge did not take into account the element of overlapping.

G The point taken for the second plaintiff is that the second plaintiff has suffered injuries to different parts of the anatomy and so it was justifiable to break up the award to various categories before the process of overlapping could be applied.

In my judgment, it is to be observed that there are merits in the submission for the second plaintiff and that the award of the learned trial
H judge for the aforesaid injuries by way of itemization is not strictly prohibited as has been so clearly enunciated by the Privy Council in *Jamil bin Harun v Yang Kamsiah & Anor* [1984] 1 MLJ 217 that 'though no statutory requirement exists in Malaysia for the itemization of damages in personal injury cases, the written law certainly does not forbid or prevent differentiation in the period or rate of interest as appropriate between the
I different heads of loss or damages suffered by a plaintiff. Nor does the written law forbid the courts to adopt the itemization process in assessing damages. The courts in Malaysia are free to take their own course and the

Federal Court was therefore not prevented by the written laws of Malaysia from using the itemization process in the assessment of damages for personal injury.' A

The assessment of damages is essentially an exercise of discretion as has been shown in *Chong Chee Khong & Anor v Ng Yeow Hin* [1997] 5 MLJ 786 (HC). The individual quantum awarded above was fair and reasonable, for separate and distinct parts of the second plaintiff's anatomy in which case the element of overlapping does not arise here. B

Conclusion

In the light of the above, I hold that the appeal against the award for loss of future earnings is allowed, and the award thereon is hereby set aside while the appeal against other aforesaid awards is dismissed and those awards are hereby confirmed. The fair and reasonable order as to costs is that each party shall bear its own costs in the appeal herein, while the order as to costs in the trial court is hereby affirmed. C

Appeal against the award for loss of future earning allowed and the award set aside; and appeal against the other awards dismissed and those awards confirmed. D

Reported by Ezatul Zuria Azhari

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End of Volume 1

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